Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

****

J.T. HAUN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

****

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

****

Gerald H. Summers
(counsel of record)

SUMMERS, MCCREA & WYATT, P.C.
500 Lindsay Street
Chattanooga, TN 37402-1490
(423) 265-2385
Attorneys for the Petitioner

38 pp

QUESTIONS PRESENTED

I. WHETHER THE EXTENSION OF 18 *U.S.C.* § 1956(a)(1)(A)(i) TO PUNISH CRIMINAL BEHAVIOR NOT INVOLVING DRUGS OR ORGANIZED CRIME CONTRAVENES THE CONGRESSIONAL INTENT BEHIND THE MONEY LAUNDERING STATUTE?

II. WHETHER 18 *U.S.C.* § 1956(a)(1)(A)(i) IS UNCONSTITUTIONALLY VAGUE BY FAILING TO DEFINE WHAT IS MEANT BY THE WORD "PROCEEDS"?

TABLE OF CONTENTS

Questions Presented.....i
Table of Contents.....ii
Table of Authorities.....iii
Cases.....iii
Statutes.....iii
Constitutional Provisions.....iv
Other Authorities.....iv
Opinions Below.....1
Statement of Jurisdiction.....1
Constitutional and Statutory Provisions Involved.....1
Statement of the Case.....2
Reasons for Granting the Writ.....3
I.....3
II.....4
III.....5
Conclusion.....5
Designation of Appendix Contents.....6
A. U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996).....A-1
B. argument excerpt from the Brief of the Defendant/ Appellant (as presented by the petitioner to the U.S. Court of Appeals for the Sixth Circuit).....B-1

TABLE OF AUTHORITIES

Cases:

Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.3d 903 (1983).....5
U.S. v. Daccarett, 6 F.3d 37, 43 (3rd Cir. 1993).....3
U.S. v. Dimeck, 24 F.3d 1239 (10th Cir. 1994).....4
U.S. v. Edgmon, 952 F.2d 1206 (10th Cir. 1991).....5
U.S. v. Hamilton, 931 F.2d 1046 (5th Cir. 1991).....4
U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996).....1
U.S. v. Heaps, 39 F.3d 479 (4th Cir. 1994).....5
U.S. v. Jackson, 935 F.2d 832 (7th Cir. 1991).....5
U.S. v. Samour, 9 F.3d 531 (6th Cir. 1993).....4
U.S. v. Skinner, 946 F.2d 176 (2nd Cir. 1991).....4
U.S. v. Werber, 787 F.Supp. 353, 358 (S.D.N.Y. 1992).....5

Statutes:

18 *U.S.C.* § 371.....2
18 *U.S.C.* § 1341.....2
18 *U.S.C.* § 1956.....3, 4, 5
18 *U.S.C.* § 1956(a)(1)(A)(i).....1, 2, 3, 4
18 *U.S.C.* § 1956(c)(7).....3
18 *U.S.C.* § 1961(1).....3,4
18 *U.S.C.* § 3231.....2
28 *U.S.C.* § 1254.....1
Money Laundering Control Act of 1986 (codified at 18 *U.S.C.* §§ 1956-1957).....3

Constitutional Provisions:

Fifth Amendment to the U.S. Constitution.....1, 5
Fourteenth Amendment to the U.S. Constitution
generally.....5
Section 1.....1

Other Authorities:

132 Cong. Rec. 18,486-18,487 (1986).....3
President's Commission on Organized Crime,
"The Cash Connection: Organized Crime,
Financial Institutions, and Money
Laundering" 4-8 (1984).....3
American Criminal Law Review, "The Money
Laundering Control Act of 1986:
Creating A New Federal offense Or
Merely Affording Federal Prosecutors
An Alternative Means Of Punishing
Specified Unlawful Activity?", by Jimmy
Gurule´, Vol. 32, p. 823-854.....3

OPINIONS BELOW

District court Judge R. Allan Edgar entered a judgment in the United States District Court for the Eastern District of Tennessee (District Court File No. 95) against the petitioner on June 26, 1995, but did not render a formal opinion, official or otherwise. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996).

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on July 19, 1996. The jurisdiction of this honorable court is invoked pursuant to 28 *U.S.C.* § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution in relevant part states "No person shall be ... deprived of life, liberty, or property, without due process of law; ..."

Section 1 of the Fourteenth Amendment to the U.S. Constitution in relevant part says that:

> ... No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, 18 *U.S.C.* § 1956(a)(1)(A)(i) provides:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity - (A)(i) with the intent to promote the carrying on of specified unlawful activity;

STATEMENT OF THE CASE

The defendant/petitioner, J.T. Haun, (referred to in this petition as the "petitioner") was convicted by a jury in the U.S. District Court for the Eastern District of Tennessee (case No. 1:94-CR-00052) on five counts of mail fraud in violation of 18 *U.S.C.* § 1341, one count of conspiracy to commit mail fraud in violation of 18 *U.S.C.* § 371, and five counts of money laundering in violation of 18 *U.S.C.* § 1956(a)(1)(A)(i). Consequently, the district court had subject matter jurisdiction in this case by virtue of 18 *U.S.C.* § 3231, which provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." The petitioner appealed his convictions to the United States Court of Appeals for the Sixth Circuit (case No. 95-5974), which affirmed the petitioner's convictions in all respects.

The gist of the conduct surrounding the petitioner's convictions revolved around the petitioner's car dealership, and the fact that the petitioner was found to have sold certain automobiles while disguising that the automobiles had been reassembled with parts that were older than would otherwise be expected by the appearance of the automobile. Regardless of how much more descriptive or detailed the

facts may be presented, for purposes of this petition the most important point is the fact that none of the allegations against the petitioner, and none of the offenses for which the petitioner was convicted, had anything to do with drugs or organized crime.

REASONS FOR GRANTING THE WRIT

I. THE EXTENSION OF 18 *U.S.C.* § 1956(a)(1)(A)(i) TO PUNISH CRIMINAL BEHAVIOR NOT INVOLVING DRUGS OR ORGANIZED CRIME CONTRAVENES THE CONGRESSIONAL INTENT BEHIND THE MONEY LAUNDERING STATUTE.

In an effort to combat international drug trafficking and traditional organized crime, Congress passed the Money Laundering Control Act of 1986 (codified at 18 *U.S.C.* §§ 1956-1957). See, 132 Cong. Rec. 18,486-18,487 (1986) (statements of Senators Thurmond and Hatch); President's Commission on Organized Crime, "The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering" 4-8 (1984); U.S. v. Daccarett, 6 F.3d 37, 43 (3rd Cir. 1993); see, also, American Criminal Law Review, "The Money Laundering Control Act of 1986: Creating A New Federal offense Or Merely Affording Federal Prosecutors An Alternative Means Of Punishing Specified Unlawful Activity?", by Jimmy Gurule´, Vol. 32, p. 823-854 (providing further details and insight into the legislative history of 18 *U.S.C.* § 1956). While mail fraud is listed as a "specified unlawful activity" under 18 *U.S.C.* 1961(1), which in turn is made applicable to 18 *U.S.C.* § 1956 through the language of 18 *U.S.C.* § 1956(c)(7), implicit within the definition of "specified unlawful activity" under 18 *U.S.C.* § 1956(c)(7) is the understanding that the offenses referred to in 18 *U.S.C.*

1961(1) must be related to drugs or organized crime in order to be applicable in 18 *U.S.C.* § 1956. Through creative thinking and application by the U.S. Attorney's office, 18 *U.S.C.* § 1956 has been expanded and applied to punish criminal behavior that are not related to drugs or organized crime, even though Congress did not intend such behavior to be covered by the money laundering statute. The majority of cases reflect the money laundering statute's intended application to drugs and organized crime, although their results are often conflicting. See, e.g., U.S. v. Hamilton, 931 F.2d 1046 (5th Cir. 1991); U.S. v. Samour, 9 F.3d 531 (6th Cir. 1993); U.S. v. Skinner, 946 F.2d 176 (2nd Cir. 1991); and U.S. v. Dimeck, 24 F.3d 1239 (10th Cir. 1994). However, in a few cases, like the petitioner's case, the government has sought to extend 18 *U.S.C.* § 1956 to cover behavior not involving drugs or organized crime.

Since the money laundering allegations against the petitioner did not involve activities related to drugs or organized crime, allowing the petitioner's conviction under 18 *U.S.C.* § 1956 to stand would effectively contravene the Congressional intent behind this statute. By reversing the petitioner's conviction as contrary to Congressional intent, this honorable court would force the government to limit prosecution under 18 *U.S.C.* § 1956 to its proper and intended context.

II. 18 *U.S.C.* § 1956(a)(1)(A)(i) IS UNCONSTITUTIONALLY VAGUE BY FAILING TO DEFINE WHAT IS MEANT BY THE WORD "PROCEEDS".

One reason the government was able to creatively prosecute the petitioner for money laundering, even though no drugs or organized crime were involved in the alleged activities, is because 18 *U.S.C.* § 1956 neglects to define the word "proceeds". This lack of a definition for the word

"proceeds" effectively allows for such creative thinking on the part of the government and thereby encourages the arbitrary and discriminatory enforcement of 18 *U.S.C.* § 1956. This shortcoming in the statute runs afoul of the requirement that penal statutes contain sufficient definiteness, see generally Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.3d 903 (1983) (citations omitted), and consequently renders the statute unconstitutionally void for vagueness under the Fifth and Fourteenth Amendments to the U.S. Constitution. Cf. U.S. v. Werber, 787 F.Supp. 353, 358 (S.D.N.Y. 1992).

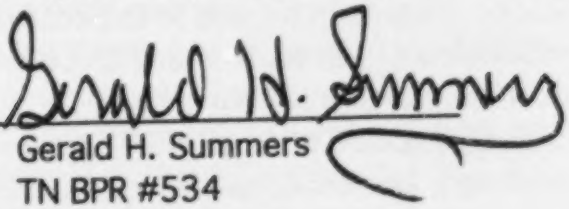
III. Both of the issues cited above have not been resolved by the U.S. Supreme Court despite numerous cases from lower federal courts construing the meaning and Congressional intent behind 18 *U.S.C.* § 1956. See, e.g., U.S. v. Edgmon, 952 F.2d 1206 (10th Cir. 1991); U.S. v. Heaps, 39 F.3d 479 (4th Cir. 1994); and U.S. v. Jackson, 935 F.2d 832 (7th Cir. 1991). Defining the permissible scope of coverage of 18 *U.S.C.* § 1956 would settle an important, and as-yet unsettled question of federal law. For additional reference, the petitioner's arguments are set forth more fully as Issues A and B in the attached "Brief of the Defendant/Appellant", which the petitioner submitted to the U.S. Court of Appeals for the Sixth Circuit.

CONCLUSION

Based on the foregoing, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SUMMERS, MCCREA & WYATT, P.C.

By: 

Gerald H. Summers
TN BPR #534
500 Lindsay Street
Chattanooga, TN 37402-1490
(423) 265-2385
Attorneys for the Petitioner

DESIGNATION OF APPENDIX CONTENTS

A. U.S. v. Haun, 90 F.3d 1096 (6th Cir. 1996)
B. argument excerpt from the Brief of the Defendant/ Appellant (as presented by the petitioner to the U.S. Court of Appeals for the Sixth Circuit)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0221P (6th Cir.)
File Name: 96a0221p.06

No. 95-5974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

J.T. HAUN,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed July 19, 1996

Before: KENNEDY and NORRIS, Circuit Judges; MATIA,* District Judge.

KENNEDY, Circuit Judge. Defendant J.T. Haun appeals his convictions for mail fraud, conspiracy to commit mail fraud, and money laundering. Defendant challenges his money laundering convictions arguing that

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*The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

there was insufficient evidence to support his convictions and that the money laundering statute is unconstitutionally void for vagueness. He also argues that the District Court improperly admitted certain deposition testimony. Finally, with respect to his sentence, defendant challenges the District Court's calculation of his offense level. For the following reasons, we AFFIRM.

I. Facts

In late 1989, defendant, the operator of Auto World, a Tennessee car dealership, began purchasing automobiles from Ron Germadnik, an Ohio car dealer. Germadnik purchased used Chevrolet Caprices at auctions specializing in wrecked and theft-recovered vehicles. Germadnik separated the cars' bodies from their chassis and replaced the old bodies with new ones. Once rebuilt, the cars looked like new and the odometers reflected low mileages. These cars were titled in Ohio and the "self-assembled" notation on the title's "previous owner" line indicated that the cars had been rebuilt. During 1989 and 1990, Germadnik sold a number of rebuilt Caprices to Auto World. Germadnik told defendant how the Caprices were constructed and provided defendant with true information regarding the chassis' years and mileages.

Defendant and his salesmen Stanford Sharp and Ray Lewis subsequently sold these cars without disclosing to buyers that they were reassembled and that the chassis had mileages far in excess of the body mileages that were reflected on the odometers. Buyers typically paid Auto World a fee to obtain a Tennessee title for them. The Tennessee titles, however, did not bear the "self-assembled" notation so buyers could not learn from the titles that these cars had been rebuilt.

When one buyer wanted to obtain a Tennessee title on his own, defendant instructed Greg Goins, a car buyer for Auto World, to obtain an Ohio title that did not have the "self-assembled" disclosure. Goins then asked Gary Burkeen, a used car wholesaler doing business as Eighty-Eight Fleet, Inc., to "flip" that title for him. To satisfy

that request, Goins supplied Burkeen with paperwork that showed that ownership of that vehicle was transferred from Auto World to Eighty-Eight Fleet, Inc. Although that transfer never occurred, the new Ohio title reflected "Auto World" rather than "self-assembled" as the previous owner.

A jury found defendant guilty on five counts of money laundering under 18 U.S.C. § 1956, five counts of mail fraud in violation of 18 U.S.C. § 1341, and one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371.[1]

II. Discussion

A. Money Laundering Convictions

1. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support his money laundering convictions under 18 U.S.C. § 1956 (a)(1)(A)(i) on two bases. He contends that (1) the money laundering statute does not apply in the context of criminal offenses that do not involve narcotics; and (2) the trial evidence did not establish the elements of money laundering. We address each argument in turn.

a. Money Laundering Statute's Application to Nondrug-Related Offenses

Defendant's first argument is that the federal money laundering statute under which he was convicted, 18 U.S.C. § 1956(a)(1)(A), was intended to reach money laundering of proceeds of narcotics transactions, not nondrug-related transactions. Because defendant's activities did not involve narcotics, he argues that his convictions under that statute were improper. The District Court rejected defendant's argument based on the clear language

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[1]Sharp and Ray Lewis were also indicted, charged, and tried for mail fraud. While Sharp was convicted of conspiracy to commit mail fraud and one count of mail fraud, Ray Lewis was acquitted.

of the statute. Reviewing the District Court's decision concerning the question of statutory interpretation de novo, *Nixon v. Kent County*, 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc), we too find defendant's argument to be without merit.

Section 1956(a) provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity
>
> . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

The statute defines "specified unlawful activity" to include "any act or activity constituting an offense listed in section 1961(1) of this title." 18 U.S.C. § 1956(c)(7). Included among the offenses listed in § 1961(1) is mail fraud in violation of 18 U.S.C. § 1341, the statute under which defendant was convicted. Nothing in the plain language of the statute suggests that the mail fraud must have been drug related. Moreover, we have previously upheld the application of § 1956 in the context of nondrug-related offenses without discussion of the issue defendant raises here. *See, e.g., United States v. Smith*, 39 F.3d 119 (6th Cir. 1994) (affirming money laundering convictions based on transactions in proceeds of mail and wire fraud that did not involve narcotics). We are satisfied that the plain language of the statute unambiguously makes mail fraud, whether or not related to drug transactions, a specified unlawful activity.

In that the statute is unambiguous, only a showing of congressional intent to exclude nondrug-related offenses from the scope of the money laundering statute would justify limiting the applicability of the statute, as defendant suggests, to financial transactions involving proceeds of narcotics trafficking. *See Garcia v. United States*, 469 U.S. 70, 75 (1984). In surveying the legislative history of § 1956, we find no intent on the part of Congress to limit its scope to only offenses involving drugs. Nor has defendant identified any legislative history that evidences Congress' intent to exclude nondrug-related activity from the statute's purview. In fact, the legislative history reflects that although § 1956 was considered necessary to combat illegal narcotics conspiracies, it was also designed to reach financial transactions involving proceeds of a broad range of criminal activity. *See* 132 CONG. REC. S9938-05, S9985-87 (1986); HOUSE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, COMPREHENSIVE MONEY LAUNDERING PREVENTION ACT, H.R. REP. No. 746, 99th Cong., 2d Sess. 16 (1986); *see also* 136 CONG. REC. S9477-02, S9505 (1990); 136 CONG. REC. E3684-02, E3685 (1990).

Because the plain language of the money laundering statute confirms the conclusion that nondrug-related criminal activity may form the basis of a money laundering conviction and nothing in the statute's legislative history reflects Congress' intent to exclude nondrug-related offenses from the statute's scope, we reject defendant's challenge to the statute's application to his conduct.

b. Sufficiency of the Evidence

Next, defendant maintains that the evidence did not support his money laundering convictions under 18 U.S.C. § 1956(a)(1)(A)(i). The standard for a challenge to the sufficiency of the evidence is whether, taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Martin*, 920 F.2d 345, 348 (6th Cir. 1990) (citing *Jackson v.*

Virginia, 443 U.S. 307, 319 (1979)), *cert. denied*, 500 U.S. 926 (1991).

Defendant contends that because the record does not evidence his efforts to disguise the connection between the car trading transactions and the mail fraud activity, the record does not support his money laundering convictions. The defendant, however, was convicted under 18 U.S.C. § 1956(a)(1)(A)(i), not 18 U.S.C. § 1956 (a)(1)(B). While a conviction under § 1956(a)(1)(B) may require proof of concealment or disguise, that evidence is not necessary for a conviction under § 1956(a)(1)(A). *See* 18 U.S.C. §§ 1956(a)(1)(A), (B); *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991) (concluding that a conviction under § 1956 requires proof of *either* intent to promote a continuing criminal enterprise *or* a design to conceal the source of the funds).

Instead, to prove a defendant guilty of violating § 1956(a)(1)(A)(i), the government must prove that the defendant: (1) conducted a financial transaction that involved the proceeds of unlawful activity; (2) knew the property involved was proceeds of unlawful activity; and (3) intended to promote that unlawful activity. 18 U.S.C. § 1956(a)(1)(A)(i).

The government has clearly adduced sufficient evidence from which a rational jury could hold defendant criminally liable. The record evidence established that defendant's applications for titles misrepresented the vehicles as new, low mileage vehicles. Defendant used the titles to deceive buyers and sell the vehicles at a price that reflected their description as low mileage vehicles instead of vehicles with higher mileages and received checks representing proceeds of this fraudulent activity. Given defendant's leadership role in the scheme, the jury could have rationally inferred that defendant knew that these checks were proceeds of that fraudulent activity. Finally, the evidence demonstrated that by cashing checks or depositing them into Auto World's bank account defendant intended to promote not only his prior unlawful activity, but also his ongoing and future

unlawful activity. *See United States v. Manarite*, 44 F.3d 1407, 1416 (9th Cir.) (finding that since a chip-skimming scheme could not benefit its participants unless the chips were cashed, a rational jury could conclude that the chips were cashed with the intent to promote the chip-skimming scheme), *cert. denied*, 115 S. Ct. 2610 (1995); *United States v. Cavalier*, 17 F.3d 90, 93 (5th Cir. 1994) (concluding that the transfer of a check furthered defendant's scheme to defraud, and, therefore, promoted the mail fraud); *United States v. Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993) (holding that a rational jury could have concluded that cashing embezzled IRS checks was intended to promote the antecedent frauds), *cert. denied*, 114 S. Ct. 1076 (1994). Accordingly, we conclude that the government's failure to offer proof of an effort on the part of the defendant to disguise or conceal the nature of the funds is not fatal to defendant's money laundering convictions and that the record evidence supports defendant's money laundering convictions.

2. Constitutional Challenge to 18 U.S.C. § 1956

Defendant's next argument is that § 1956's failure to define "proceeds" renders that statute vague in violation of his due process rights under the Fifth and Fourteenth Amendments. " '[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' " *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1754 (1994) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). We conclude that, as applied in this case, the term proceeds is not unconstitutionally vague.

When the common meaning of a word provides both adequate notice of the conduct prohibited and standards for enforcement, a statute's failure to define a term will not render the statute unconstitutionally void for vagueness. *See United States v. Kaylor*, 877 F.2d 658, 661 (8th Cir.), *cert. denied*, 493 U.S. 871 (1989). "Proceeds" is a

commonly understood word in the English language. It includes "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807 (1971). Because the term "proceeds" has a commonly accepted meaning, an ordinary person would be able to recognize whether the conduct in question is criminal. *See United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (finding that the use of the word "proceeds" in the context of the money laundering statute is not ambiguous).

Further, despite defendant's suggestion, there is no doubt that the checks he received from the sales of the automobiles fall within the common understanding of "proceeds of specified unlawful activity." This interpretation of proceeds presents no threat of arbitrary or discriminatory enforcement. Therefore, because the term proceeds provides adequate notice of the conduct prohibited and the commonly understood meaning of that term does not subject the statute to arbitrary or discriminatory enforcement, we conclude that § 1956 is not unconstitutionally vague as applied to defendant's conduct.

B. Admission of Deposition Testimony

Defendant also challenges the District Court's admission of transcripts containing deposition testimony that he allegedly gave in civil actions brought by the victims of his fraudulent scheme. The District Court rejected defendant's challenge to the transcripts' authenticity, finding that they appeared to be official transcripts, recorded in civil litigation, by established court reporter firms, and thus, were legitimate transcripts. Claiming that the government failed to establish the authenticity of copies of the transcripts which were uncertified and not signed, defendant argues that the District Court improperly admitted that evidence.

After the government introduced portions of these transcripts, however, the defendant himself introduced portions of those transcripts *other* than those offered by the

government. Those portions introduced by the defendant were independent of those portions introduced by the government. That is, they did not refute or put into context the statements introduced by the government. Instead, they addressed questions unaddressed by those sections the government introduced at trial. The defendant's independent use of his own deposition testimony attested to the transcripts' authenticity, thereby removing any uncertainty regarding their admissibility on that ground. As such, the defendant's use of his own deposition testimony ratified the authenticity of the transcripts. This use was a waiver of his objection.[2]

Defendant also objects to the admission of his statements contained in the deposition transcripts on the basis that they are inadmissible hearsay. We find that since these statements were defendant's own statements, offered against him, and related to the offenses for which he was convicted, they are admissible nonhearsay under Federal Rule of Evidence 801(d)(2). Therefore, we find no error in the District Court's admission of the deposition testimony.

C. Sentencing Objections

1. Loss Estimate

Objecting to the District Court's calculation of his base offense level, defendant suggests that the District Court improperly calculated the loss attributable to his unlawful activity. Because this calculation of loss was inconsequential to the District Court's determination of an appropriate sentence, we find it unnecessary to address the merits of defendant's argument.

Adopting the presentence report, the District Court first separated the mail fraud counts into one group of offenses

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[2]We express no opinion as to whether a party's use of *another's* statement can ratify the authenticity of that evidence when that party previously objected to its authenticity.

and the money laundering counts into another pursuant to USSG § 3D1.2(d). Offense levels for each group were calculated pursuant to USSG § 3D1.3. Based in part on the loss to the victims, which the District Court found to be $17,518, the adjusted offense level for defendant's mail fraud was nineteen. The adjusted offense level for the money laundering group, which was arrived at by adding the base offense level of twenty-three, a four point increase for defendant's leadership role in a scheme with at least five participants, and a two point increase for obstruction of justice, totaled twenty-nine; because the District Court valued the total loss to the victims as under $100,000, the adjusted offense level for these money laundering counts was unaffected by the District Court's calculation of the loss to the victims. *See* USSG § 2S1.1(b)(2).

Then, the District Court grouped the mail fraud counts and the money laundering counts together pursuant to USSG § 3D1.2(c). Under the grouping rules, the offense guideline that produces the highest offense level dictates the sentencing range. USSG § 3D1.3(b). Here, the higher offense level was associated with the money laundering counts, not the mail fraud counts. Therefore, the offense level generated by the money laundering counts governed defendant's sentencing range. Because the loss to the victims, as calculated by the District Court, was not in an amount sufficient to increase the offense level generated by the money laundering counts, it is unnecessary for us to determine whether the District Court's calculation of loss was erroneous.

2. Leadership Role in a Scheme with at Least Five Participants

Defendant also contends that the District Court's conclusion that he was an organizer or leader of a criminal activity involving at least five participants was clearly erroneous such that the four point enhancement to his base offense level for the money laundering counts under USSG § 3B1.1(a) was also clearly erroneous. The District Court's finding that enhancement was warranted under

USSG § 3B1.1(a) is subject to review for clear error. *See United States v. Ward*, 68 F.3d 146, 151 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1028 (1996).

Under the Sentencing Guidelines, the base offense level is increased by four points "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants." USSG § 3B1.1(a). The finding that an individual was a participant in the criminal activity must be supported by a preponderance of the evidence. *Ward*, 68 F.3d at 151.

The District Court found that six individuals – J.T. Haun, Stanford Sharp, Ray Lewis, David Lewis, Gary Burkeen, and Greg Goins – were criminally responsible for the commission of the offenses. Accordingly, the District Court increased defendant's money laundering offense level by four points. Defendant challenges the District Court's findings that Ray Lewis, David Lewis, and Greg Goins were responsible for the criminal activity.

With respect to Ray Lewis, defendant argues that the District Court is precluded from finding him criminally responsible since he was acquitted. This argument, however, is without merit. Application note 1 of USSG § 3B1.1 provides that a "participant" in criminal activity is a "person who is criminally responsible for the commission of the offense, but need not have been convicted." Therefore, Ray Lewis' acquittal does not preclude the District Court from finding that the preponderance of the evidence established that he was a participant in defendant's criminal scheme. While the elements of a crime must be proved beyond a reasonable doubt for a conviction, the facts supporting a sentence enhancement need be supported by only a preponderance of the evidence. Thus, a finding of facts supporting a sentence enhancement is not inconsistent with an acquittal. Because Ray Lewis testified that he knew that the cars were reassembled and a victim of defendant's criminal scheme testified that Ray Lewis sold her a car without revealing its rebuilt status, we find

no error in the District Court's finding that Ray Lewis was a participant in defendant's criminal activity.

Next, defendant challenges the District Court's finding that David Lewis was a participant in defendant's criminal scheme. Defendant suggests that because David Lewis was never criminally charged he could not have been a participant. Again, to be a participant in criminal activity for purposes of this sentencing guideline, the individual need not have been convicted, regardless of whether he was charged. *See* USSG § 3B1.1, comment. (n.1). Although at trial David Lewis denied his role in the criminal scheme, another victim of defendant's criminal scheme testified that David Lewis sold him a car without disclosing that it had been reassembled. Given David Lewis' criminal history of odometer tampering and mail fraud, the District Court did not clearly err when it credited the testimony of the victim and found that David Lewis was a participant in this criminal scheme.

Finally, defendant contests the District Court's finding that Greg Goins was also criminally responsible for the commission of defendant's offenses. Defendant bases his argument on the absence of Goins' testimony. However, based on Burkeen's testimony regarding Goins' request that he flip a title, the District Court did not err in concluding that Goins was a criminally responsible participant in defendant's illegal scheme.

Because the preponderance of the evidence indicated that defendant was the organizer or leader of criminal activity that involved five or more participants, including Ray Lewis, David Lewis, and Goins, we conclude that the District Court did not err when it increased defendant's offense level by four points.

III. Conclusion

For the reasons stated, we AFFIRM the decision of the District Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA *Plaintiff/Appellee,*	*	
	*	No. 95-5974
vs.	*	
J.T. HAUN *Defendant/Appellant.*	*	

On Appeal from the United States District Court
for the Eastern District of Tennessee at Chattanooga
District Court No. 1:94-CR-00052; R. Allan Edgar, Judge

BRIEF OF THE DEFENDANT/APPELLANT

ORAL ARGUMENT REQUESTED

JERRY H. SUMMERS
SUMMERS, MCCREA & WYATT, P.C.
500 Lindsay Street
Chattanooga, TN 37402-1490
423/265-2385
Attorney for the Defendant/Appellant

ARGUMENT

A.

WAS THE EVIDENCE INSUFFICIENT TO SUPPORT FINDINGS THAT APPELLANT WAS GUILTY OF VIOLATING 18 U.S.C. § 1956 (MONEY LAUNDERING) BECAUSE THE USE OF SAID STATUTE IN A NON-DRUG CASE VIOLATES THE ORIGINAL CONGRESSIONAL INTENT IN ENACTING SAID LAW?

18 U.S.C. § 1956(a)(1)(A) is the Promotion Provision of the Federal Money Laundering Statute. It provides as follows:

> (a)1 Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts, or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity, . .
>
> (A)(1) with the intent to promote the carrying on of specified unlawful activity.

The legal and legislative history of 18 U.S.C. § 1956 as outlined in 132 Cong. Re. 18, 486 - 18, 487 (1986) (statements of Senators Thurmond and Hutch); President's Commission on Organized Crime, The Cash Connection, Organized Crime Financial Institutions and Money Laundering 4-8 (1984) [hereinafter the Cash Connection]; United States v. Daccarett, 6 F.3d 37 (2nd Cir. 1993);

Public Law No. 99-570, 100 Stat. 3207 (1986) (codified at 18 U.S.C. §§ 1956-1957 (1988); Carl P. Florez and Bernadette Boyce, Laundering Drug Money, F.B.I. Law Enforcement Bulletin, April 1990, at 22-23; Lawrence Note, Let the Seller Beware: Money Laundering, Merchants and 18 U.S.C. §§ 1956-1957, (33 B.L. Rev. 841) (1992); House Committee on Banking, Housing and Urban Affairs, Comprehensive Money Laundering Prevention Act, H.R. Rep. No. 746, 99th Cong., 2nd Sess. 16 (1986), United States v. Garcia - Emmanuel, 14 F.3d 1469 (11th Cir. 1994); Drug Money Laundering Hearing Before the Senate Commission on Banking, Housing and Urban Affairs, 99th Cong., 1st Sess. 7(1985); International Narcotics and Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914 (1992) (codified at 31 U.S.C. §§ 321, 5311-5314, 5316-5322 (1988 & Supp. V, 1993); 31 U.S.C. § 5324 clearly indicates that Congress fully intended to enact laws to combat the crime of money laundering which has been characterized as "the lifeblood of international narcotics, trafficking and traditional organized crime".

Federal prosecutors, through creative adaptation, have expanded the use of said statutes well beyond the congressional legislative intent and initial purpose to fight the narcotics trade to try and create 18 U.S.C. §§ 1956 and 1957 violations in any scheme where money is involved.

The scheme alleged in counts 8-12 of the Superseding Indictment alleges Money Laundering violations between the dates December 22, 1989 and June 2, 1990.

In the Conspiracy count (Count I) of the indictment, it is alleged that the conspiracy dates are between December 1, 1989 and September 27, 1991, yet there are not listed any overt acts, schemes to defraud or mailings alleged on the 1991 date. (R.16).

The original indictment which was replaced by the superseding indictment alleges a mailing on September 27, 1991 of an application for title for a 1989 Chevrolet Caprice (R). A review of the transcript of the trial indicates that the only mention of a September 1991 date is in the testimony of Robert Hixson, who states that he took the 1989 Caprice that he purchased from Auto

World to Family Buick in Dalton, Georgia and traded it for a 1991 Buick (Vol. I, pp. 119-120).

The Racketeer Influence and Corrupt Organizations Act contained in 18 U.S.C. § 1961 was amended in the Act on October 27, 1986 in paragraph (1)(B) to insert section 1956 (relating to the laundering of monetary instruments).

The RICO statute was likewise enacted to fight organized crime.

The Fourth Circuit in a case involving the wire transfer of money as payment for drugs received on consignment held that this did not promote unlawful activity within the meaning of 18 U.S.C. § 1956(a)(1)(A)(i); United States v. Heaps, 39 F.3d 479 (4th Cir. 1994). Likewise, the Sixth Circuit in United States v. Samour, 9 F.3d 531 (6th Cir. 1993) overturned a money laundering violation and ruled that the mere transportation of narcotic proceeds does not violate 18 U.S.C. § 1956(a)(1)(A)(i).

It is respectfully submitted that Congress' interest in passing the money laundering statute was to punish narcotics dealers and

investors in organized crime. The United States Supreme Court has often stated that when two rational readings of a criminal statute, one harsher than the other, the court is to choose the harsher only when Congress has spoken in clear and definite language. United States v. Bass, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222, 73 S.Ct. 227, 229-230, 97 L.Ed.260 (1952); *see also* Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1060, 28 L.Ed.493 (1971).

At the sentencing hearing held in appellant's case, present counsel raised this issue. (Vol. V, pp. 4-16).

Contra authority to appellant's position is found in United States v. Taylor, 984 F.2d 298 (4th Cir. 1993) which states that 18 U.S.C. 1961(1) is incorporated by reference into 1956(c)(7)(A) and the use of said statute is not specifically limited to those situations which rise to the level of RICO.

The Government's action in charging appellant with violating 18 U.S.C. § 1956 is further misapplied because no drug proceeds are

involved. The federal courts have consistently held that even where drugs are involved, neither the exchange of money for drugs, nor the transportation of the proceeds of drug sales by itself, contributes a violation of said section. United States v. Skinner, 946 F.2d 176 (2nd Cir. 1991); United States v. Hamilton, 935 F.2d 1046 (5th Cir. 1991).

In another case actually involving the wire transfer of money as payment for drugs received on consignment did not promote unlawful activity within the meaning of 18 U.S.C. § 1956(a)(1)(A)(i). United States v. Heaps, 39 F.3d 479 (4th Cir. 1994). Likewise, the Sixth Circuit in United States v. Samour, 9 F.3d 531 (6th Cir. 1993) overturned a money laundering violation and ruled that the mere transportation of narcotics proceeds does not violate 18 U.S.C. § 1956(a)(1)(A)(i). *See also* United States v. McDougald, 990 F.2d 259 (6th Cir. 1993).

It is respectfully submitted that the evidence is insufficient to convict the appellant for two reasons: the use of the money laundering statute for a non-drug funds case is misapplied; and

the facts of the appellant's case are insufficient to satisfy the necessary elements of the offense, particularly the absence of efforts to disguise the connection between the car trading transactions and the alleged illegal activity. United States v. Sanders, 929 F.2d 1466 (10th Cir. 1991), and United States v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994).

B. .

IS 18 U.S.C. § 1956(C) UNCONSTITUTIONALLY VOID FOR VAGUENESS IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE IT FAILS TO DEFINE "PROCEEDS"?

Section 1956 prohibits conducting transactions that involve the "proceeds of specified unlawful activity." The statute does not define "proceeds" and thus invites a wide range of interpretation. Can "proceeds" be something other than money?

In Section 1937, Congress prohibited certain transactions involving "criminally derived property" rather than "proceeds". Yet, "criminally derived property" is broadly defined in terms of proceeds: "any property constituting, or derived from, proceeds

obtained from a criminal offense." 18 U.S.C. § 1957 (f)(2)(1988 & Supp. V. 1993).

If the two statutes are read together, the phrase "derived from" in section 1956 may have a limited meaning.

The accepted definition of "proceeds" has been held to include more than just money. In United States v. Weber, 787 F.Supp. 353 (S.D.N.Y. 1992), the court adopted the following common law understanding of "proceeds" stated in Phelps v. Harris, 101 U.S. 370 (1879):

> The expression "to dispose of" is very broad, and signifies more than "to sell." Selling is but one mode of disposing of property. It is argued, however, that the subsequent direction to invest the proceeds indicates that a sale was meant. But this does not necessarily follow. Proceeds are not necessarily money. This is also a word of great generality. Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefore such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with; and the lands received would be the proceeds.

In Weber, supra, the court concluded that the words, as used in § 1956(a)(1), can include property other than money or cash equivalents, even if that property has not been purchased with the

money derived from unlawful activity.

In response to constitutional challenges, several courts have held that neglecting to define "proceeds" does not render § 1956 void for vagueness. United States v. McLamb, 985 F.2d 1284, 1291 (4th Cir. 1993); United States v. Kaufmann, 985 F.2d 884, 896 (7th Cir. 1993); United States v. Gleave, 786 F.Supp. 258, 270 (W.D.N.Y. 1992); and United States v. Mainieri, 691 F.Supp. 1394, 1397 (S.D. Fla. 1988). This last decision is particularly significant because the term "proceeds" is defined in the context of the money laundering statute to hold that individuals who engage in financial transactions concealing the *narcotics* (emphasis added) source of the money are clearly put on notice by the unambiguous wording of § 1956.

It is this distinguishing aspect that the appellant asks the court to consider in determining whether this lack of defining "proceeds" violates the void for vagueness test set forth in Kolender v. Lawson, 461 U.S. 352, 357 (1983), which states:

> "The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what

> conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

C.

WAS THE TRIAL COURT'S RULING THAT PRIOR UNSWORN DEPOSITIONS OF EXAMINATION OF THE APPELLANT IN CIVIL ACTIONS INVOLVING SOME OF THE CARS IN QUESTION COULD BE READ BY AN F.B.I. AGENT UNDER RULE 803(2A) OF THE FEDERAL RULES OF EVIDENCE PREJUDICIAL, OR ABUSE OF DISCRETION AND CLEARLY ERRONEOUS?

Over the objection of the appellant, F.B.I. Special Agent Scott Barker was allowed to read excerpts of copies of unsworn and uncertified depositions of the appellant in civil actions in the Circuit Court of Bradley County, Tennessee. The court reporter who transcribed the depositions was not called to certify the documents' authenticity. (Vol. II, pp. 292-305) (Exhibits 10-12).

Rule 803 of the Federal Rules of Evidence states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . . .

(24) *Other Exceptions.* - A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The residual hearsay exceptions were expected to be used very rarely and only in exceptional circumstances. This Rule was not intended to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rule 803.

The trial judge obviously overlooked the requirements of Rule 901, F.R.E., pertaining to the requirement of authentication or identification:

(a) *General Provisions.* - The requirement of

authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* - By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule.

(1) Testimony of Witness with Knowledge. - Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. - Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier or Expert Witness. - Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. - Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. - Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time, under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. - Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. - Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public

office where items of this nature are kept.

(8) Ancient Documents or Data Compilation. - Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or System. - Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute or Rule. - Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

None of these authentication requirements were satisfied by the action of the trial judge. The significance of this testimony is highlighted by the fact that the Government introduced the appellant's deposition testimony as its last testimony in its case in chief.

The burden of proof for authentication of documents is that slight circumstantial evidence may suffice to authenticate an exhibit. What is required is a foundation upon which the finder of fact can draw the influence that the evidence is what it is claimed to be by the proponent. United States v. Elkins, 885 F.2d 775 (11th Cir. 1989).

Appellate review is confined to determining whether the trial judge abused his discretion in determining that a prima facie case has been made to support the exhibits' authenticity. Alexander Dawson, Inc. v. NLRB, 586 F.2d 1300 (9th Cir. 1978).

The trial judge clearly did not authenticate the unsigned, unsworn depositions by a non-certifying FBI agent who was not present when they were taken to bring their admissibility into evidence under Rule 803 (24).

This prejudicial evidence should have been excluded and forms the basis for reversible error.

D.

WAS THE TRIAL JUDGE'S RULING THAT THE APPELLANT'S SENTENCE UNDER THE FEDERAL SENTENCING GUIDELINES SECTION 2F1.1(B)(1) BE INCREASED BECAUSE THE ANNUAL LOSS WAS OVER TEN THOUSAND DOLLARS ($10,000.00) CLEARLY ERRONEOUS?

The appellant objected to a three point increase in determining the loss because it allegedly involved over $10,000.00 pursuant to Sentencing Guideline section 2F1.1(b)(1)(D) (Vol. V, Judgment Proceedings, pp. 16-28).

The trial judge used the Galves Auto Price List as the standard for determining the loss to the victims to come up with the $17,000.00 figure. The basis for his reasoning was that he had used this guide in a previous odometer case in his court.

However, the appellant's case is entirely different from an odometer case. As indicated by the testimony of Government witness, Ronald Germadnik, the price of a vehicle is driven by the *body*, and not by the *frame* or *chassis*. (Vol. I, pp. 43-44).

The alleged scheme in this case is entirely different from an odometer case and to use the Galves standard injects speculation as to the amount of loss.

Footnote 8 to 2F1.1 allows that the loss not be determined with precision. However, an appropriate and non-speculative method must be used to at least get over the threshold question of a proper way to try and calculate said loss. This was not done in the appellant's case.

It is likewise significant that there is no Government proof in the record to refute the expert testimony of Mr. Germadnik.

The reliance on Comment 7(a) of 2F1.1 by the court is likewise incorrect. Under the facts of appellant's case the actual loss to the victims by their own testimony is substantially less than that claimed by the prosecution and probation officer and affirmed by the trial court.

Although some of the victims stated that they would not have bought the car if they had known it had a chassis and motor with high miles on them, none of them specifically claimed a loss with a value. In fact, some of them showed by their testimony that they sustained very little loss:

A. Joe Kelly (Vol. I, pp. 52-78)
   1. Bought car for $13,250.00
   2. Sold car for $11,000.00
   3. Put 16,000 miles on car

B. James Burger (Vol. I, pp. 79-95)
   1. Bought car from Joe Kelly for $11,000.00
   2. Still had car
   3. Put 52,000 miles on car

C. Robert Hixson (Vol. I, pp. 97-121)
   1. Bought car for $10,995.00
   2. Traded for '91 Oldsmobile - got $8,000.00 on trade in
   3. Kept car from December '89 - September '91;

says he was a little worse off

D. Arlen Moore (Vol. II, pp. 133-151)
   1. Bought car for $11,500.00
   2. Still has car - 4 years
   3. Put 50,000 miles on car

E. Wallace Cross (Vol. II, pp. 152-180)
   1. Bought car for $10,995.00
   2. Car driven for 2 years without major repairs

F. Terry Robertson (Vol. II, pp. 191-209)
   1. Bought car for $11,900.00
   2. Got trade in of $6,500.00
   3. Put 62,000 miles on car in 4 years

There appears to be no reported decisions on this type of alleged loss in value. In United States v. Whitlow, 979 F.2d 1008 (5th Cir. 1992), the district courts use of the National Automobile Dealers Association (NADA) guide that stated the reduction of value for high mileage should not exceed 40% of a car's value. However, there is not taken into consideration any corresponding increase in the value of the vehicle because it had a new body, seats and interior.

In United States v. Alborz, 818 F.Supp. 1306 (N.D. Cal. 1993), another odometer case, the defendants, in addition to rolling back the odometers, also performed legitimate detailing and

rehabilitation work which improved the value of the cars.

The government argued that the loss calculation should subtract the defendant's purchase prices from the ultimate resale prices.

Obviously the district court in appellant's case did not use any legitimate method which was based on a proper method of calculation of loss and this portion of the sentence should be remanded for further review.

E.

WAS THE TRIAL JUDGE'S RULING THAT THE APPELLANT'S SENTENCE UNDER THE FEDERAL SENTENCING GUIDELINE SECTION 3B1.1(A) BE INCREASED BECAUSE HE WAS A LEADER AND ORGANIZER OF FIVE OR MORE PARTICIPANTS CLEARLY ERRONEOUS?

At the sentencing hearing, the appellant objected to the additional points assessed against him under Guidelines Section 3B1.1(a) for being the leader of a group with five (5) participants. (Vol. V, pp. 31-37).

The court held that these were six (6) individuals engaged in criminal activity: J. T. Haun, Stanford Sharp, Ray Lewis, David

Lewis, Greg Goins and Gary Burkeen.

Of course, Ray Lewis was acquitted and his son was never charged with any offense. The fact that his father was acquitted on the vehicle pertaining to which he gave testimony likewise is significant. No testimony is in the record from Greg Goins, and, once again, to include him in the group would be speculation as to his involvement and intent.

The appellant at the hearing cited the court the 6th Circuit cases of United States v. Austin, 984 F.2d 705 (6th Cir. 1993) and United States v. Moreno, 933 F.2d 362 (6th Cir. 1991), where the Government did not prove that the appellant's employees were criminally responsible that 3B1.1(a) was inapplicable.

The appellant respectfully contends that the trial court was clearly erroneous in finding there were five (5) participants in the involved scheme.

CONCLUSION

For all the foregoing reasons, the appellant respectfully asks for the following review:

1. Reverse and dismiss his money laundering convictions under 18 U.S.C. § 1956;

2. Grant him a new trial on the conspiracy and mail fraud convictions under 18 U.S.C. § 2 and 1341;

3. Alternatively, the appellant asks that his case be remanded for resentencing in accordance with the sentencing guidelines after reducing the sentence levels because of the clearly erroneous calculations of value of loss pursuant to 2F1.1 and number of participants pursuant to § 3B1.1(a).

Respectfully submitted:

SUMMERS, MCCREA & WYATT, P.C.

By:/S/ Jerry H. Summers
Jerry H. Summers, TN. BPR# 534
500 Lindsay Street
Chattanooga, TN 37402
423/265-2385
Attorneys for defendant/appellant